RECORD AND BRIEFS

No. 16-712

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OIL STATES ENERGY SERVICES, LLC,

Petitioner,

v.

GREENE'S ENERGY GROUP, LLC, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMICUS COUNSEL IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The Association Of Amicus Counsel ("AAC") is an independent, unincorporated non-profit organization of lawyers of diverse affiliations and law practices, who are committed to serving the public interest, and who, by training, scholarship, experience, and discernment in their respective areas of the law, are possessed of the requisite proficiency in preparing and submitting *amici curiae* briefs that are helpful to courts. Briefs are submitted by the AAC in support of individuals and entities both here and abroad, or in support of neither as may be appropriate. Such individuals and entities are those who feel called upon to participate in the judicial process by having their voices heard in cases of controversy, including precedent-setting litigations whose issues of contention and outcomes will affect the interests of the public, including their own, and of others similarly situated. The AAC broadly focuses on advancing the science of jurisprudence through the submission of briefs in specific cases of importance to legitimately advocate, promote, and assist in the correct judicial development of the law in the time-honored tradition of "friends of the court."

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. Respondent, Greene's Energy Group, LLC's written consent to this filing, and Federal Respondent's written consent to this filing, are submitted herewith. Petitioner consented to the filing of *amicus briefs* in support of either party or neither party in a docket entry dated July 7, 2017.

Because of the increasing prevalence of IPR proceedings and the impact of such proceedings on patent owners, the AAC's associated counsel and their clients have a strong interest in the issues presented in this case.[2]

SUMMARY OF ARGUMENT

The issue before the Court is whether the America Invents Act of 2011 ("AIA") post-patent-grant Inter Partes Reviews ("IPR"), which is an adversarial proceeding used by the U.S. Patent & Trademark Office ("USPTO") to analyze the validity of existing patents, violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.

The views expressed herein are based upon the constitutional jurisprudence related to the question, which analysis derives from the status of the exclusive patent right as a public property right or a private property right. They also comprise the interpretation of the Patent & Copyright clause of the United States Constitution; the intent and purpose of the clause as articulated by the

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2. The arguments made in this brief were approved by an absolute majority of AAC's associated counsel, but do not necessarily reflect the views of all of the associated counsel of the AAC, or of the law or corporate firms with which those associated counsel are affiliated. After reasonable investigation, the AAC believes that no associated counsel of the AAC who voted in favor of filing this brief, nor any attorney affiliated with any such associated counsel in any law or corporate firm, represents a party to this litigation. Some associated counsel or affiliated attorneys may represent entities, including other *amici curiae*, which have an interest in other matters that may be affected by the outcome of this litigation.

Framers of the Constitution; and, an understanding of the natural law attributes of life, liberty and property.[3]

1. The IPRs are an unconstitutional usurpation of, and intrusion on, the Article III Separation of Powers and a denial of the Seventh Amendment right to a jury trial. Congress's AIA provision, establishing the IPR administrative agency adjudication of patent validity disputes and cancellation, in a non-Article III forum without a jury, is contrary to the Supreme Court's historical precedent, the antecedent common law, and the Patent & Copyright clause's mandate.

2. The patent right, as found in this Court's historical precedent and the antecedent common law, as intended by the Framers of the Constitution, and as comprehended by the natural law or the nature of the thing, is a private property right. *See* May, Randolph J. & Cooper, Seth L., *The "Reason and Nature" of Intellectual Property:*

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3. *Amicus Curiae's* analysis and conclusions are informed by a review of the principles, precepts, and concepts as noted. It does not express any opinion regarding the utility of a legislatively promulgated post-grant review proceeding that is properly constructed in fidelity with the U.S. Constitution. Nor does it directly address the *presumptively valid patents* issued by the thousands of hardworking USPTO patent examiners, and the hundreds of dedicated, thoughtful and highly competent, Patent Trial and Appeals Board ("PTAB") Administrative Patent Judges ("APJ") tasked to conduct PTAB IPR trials within the confines and administrative construct of Congress' mandate in the AIA. Moreover, it addresses the question of whether a provision of a statute (*e.g.*, the AIA), enacted by an Article I Congress and executed by an Article II Executive Agency (the USPTO), violates the U.S. Constitution Article III Separation of Powers and the Bill of Rights' Seventh Amendment Right To A Jury.

Copyright and Patent in The Federalist Papers, Perspectives from the Free State Foundation Scholars, January 14, 2014, Vol. 9, No. 4.[4]

3. The intent and purpose, or imperative, of the Patent & Copyright clause of the U.S. Constitution, comprises three distinct principles: (1) to incentivize innovation; (2) to secure the patent rights to the individual (*e.g.*, a private right) rather than the sovereign (*e.g.*, a public right); and, (3) the uniformity of protection for those rights. *See* The Federalist No. 43 (James Madison). IPRs violate each of those three principles.

ARGUMENT

I. Administrative Agency IPRs Are An Unconstitutional Usurpation Of, And Intrusion On, The Article III Separation Of Powers And A Denial Of The Seventh Amendment Right To A Jury Trial

A. It is Improper for an Administrative Agency Adjudicative Body to Invalidate Patents because it Violates the Article III Separation of Powers

The separation of powers under the United States Constitution is the backbone of our tripartite system of government. Conflicts between and among the three branches arise in many circumstances relating to the governance of the People and the Constitutional authority for a particular branch to exercise its power.

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4. Available at http://www.freestatefoundation.org/images/The_Reason_and_Nature_of_Intellectual_Property_011014.pdf

Recent examples include war powers, health care and immigration. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (war powers - Separation of Powers); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Affordable Care Act - Separation of Powers); *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (naturalization/immigration - Separation of Powers) (2015). Ultimately these conflicts are resolved by this Court.

The present case illustrates such conflict between the three branches of government, and the separation of powers, with respect to the constitutionality of adjudicating patent validity disputes in Administrative tribunals created under Article I enumerated powers and operating in Article II Agencies rather than the constitutionally required Article III Court adjudication of those disputes.

The Supreme Court's jurisprudence, deciding the constitutionality of conflicting jurisdictional authority among the three branches, in this instance, is based on an analysis addressing "public rights" (*e.g.*, disputes between a private party and the government or between private parties concerning public property rights) and "private rights" (*e.g.*, disputes between private parties concerning private property rights).

The public/private property rights dichotomy, and the conflict among the three branches of government has presented itself in this case involving the adjudication of a dispute between private parties concerning the validity of rights secured to an individual inventor under a lawfully issued United States patent certificate. The patent certificate was issued based upon the sovereign's promise

of exclusivity for a limited period of time in exchange for the individual inventor's disclosure of his private creative thoughts and ideas.

B. Background Of The Patent Law Adjudication Conflict Issue

Article I, Section 8, Clause 8, of the United States Constitution provides the explicit enumerated power of Congress to secure for inventors the exclusive right to their inventions for a fixed period of time, in exchange for disclosure of the invention to the public, as follows:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Id.

The U.S. Patent laws developed through the common law and from an early Act of Congress. In 1952, Congress codified much of today's U.S. patent law (the Patent Act of 1952). With few exceptions, the law remained as codified in the Patent Act of 1952 until 2011 when Congress enacted a major overhaul in the law in the form of the AIA.

Pursuant to the AIA, Congress authorized, *inter alia*, the Article II Executive Branch agency that administers the United States Patent system, the Commerce Department's United States Patent and Trademark Office, to establish an administrative tribunal proceeding to decide challenges to the validity of a U.S. patent issued by the USPTO. The administrative agency tribunal charged with this function is the Patent Trial and Appeals Board.

These Article II administrative agency proceedings are referred to as an inter-partes review or IPR conducted by Article I APJs. This change in the patent law is troublesome since prior to the AIA any adversarial challenge to the validity of a U.S. patent and determination to revoke or cancel the Patent was decided by the Article III courts. Additionally, it is significant to note that besides running afoul of historical precedent, the PTAB proceeding functions without a jury, operates under different evidentiary standards and presumptions, and employs different methods of interpreting the claim language of the patent which informs the public regarding the limitations or "metes and bounds" of the invention as described and claimed in the patent. Additionally, as is common with Article I tribunal proceedings, there is no Seventh Amendment right to a jury.

The distinctions between the Article III court adjudication of disputed patent validity and Article II administrative tribunal proceedings inform the question that is before the Supreme Court. The issues or questions being decided are whether the Separation of Powers and the Seventh Amendment are violated by the AIA empowering an Article II administrative agency tribunal to assert judicial power concerning the property rights between private parties embroiled in a private dispute and whether those property rights are "private" property rights or "public" property rights.

C. The Integrity of the U.S. Patent System and Fidelity to the Constitutional Mandate to Incentivize Innovation and Creative Aspirations, Secure the Intellectual Property Rights to Individuals, and Provide Uniform and Stable Patent Laws, Relies Upon the Proper Separation Of Powers in Enforcing Those Rights

The question of the constitutionality of administrative agency adjudication of patent validity is of utmost importance in preserving the integrity of the United States patent system and the viability of the Constitutional imperative to promote progress and innovation. *See* U.S. Const. art. I, § 8, cl. 8.

As clearly stated by James Madison in Federalist No. 43, referring to the enumerated power:

> A power "to promote the progress of science and useful arts, by securing for a limited time, to authors and inventors, the exclusive right, to their respective writings and discoveries."
>
> "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, *seems with equal reason to belong to the inventors.* The public good fully coincides in both cases, with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress."

Id. (emphasis added).

There is no greater evidence of the success of this Constitutional imperative than the United States' position as the leading worldwide economic and technological powerhouse. The success of the U.S. patent system, relying on the quid pro quo of disclosure by the individual of his/her most private and intimate creative thoughts in exchange for the promise of a limited period of time for exclusivity over the use of those private thoughts has spurred innovation through inspiration of others to build upon and/or build around disclosed inventions to achieve the proverbial "better mouse trap."

As recognized by the Framers of the Constitution, the right to inventions is a natural right that belongs to inventors not to the public. Thus, there can be no mistake that the right is a "private" right rather than a "public" right. *See* May, Randolph J. & Cooper, Seth L., *The "Reason and Nature" of Intellectual Property: Copyright and Patent in The Federalist Papers*, Perspectives from the Free State Foundation Scholars, January 14, 2014, Vol. 9, No. 4, at 9-10.

D. An Inventor's Disclosure of Private Creative Thoughts Should Enjoy The Same Protection as Disclosure of any Other Private Thoughts

In other contexts the Supreme Court recognizes the Constitution's guarantees that an individual's innermost private thoughts (which also comprise the genesis of all intangible intellectual property) are private and entitled to protection from compelled or induced disclosure (*e.g.*, Fifth Amendment right against self-incrimination). Likewise,

once expressed or disclosed, these private thoughts are afforded protection as well (*e.g.*, First Amendment free speech, Fourth Amendment protection against illegal search and seizure).

Private property rights emanating from an individual's private thoughts and ideas should be afforded no less constitutional protection merely because they involve intellectual property thoughts. In fact, it arguably carries greater weight since the sovereign induces the individual inventor to disclose such private thoughts and ideas in exchange for the promise of limited exclusivity. The mere fact that the sovereign issues a certificate, evidencing this agreement between the inventor and the sovereign, is insufficient in itself to transform these valuable private rights into a public right. In fact, the patent laws recognize the distinction in that disclosed but not claimed subject matter is considered dedicated to the public domain rather than retained by the disclosing inventor. *Miller v. Brass Co.*, 104 U.S. 350 (1882) ("the claim of a specific device or combination, and an omission to claim other devices or combinations *apparent on the face of the patent*, are, in law, a dedication to the public of that which is not claimed. It is a declaration that that which is not claimed is either not the patentee's invention, or, if his, he *dedicates* it to the public.") (emphasis added).

Similarly, once a patent expires the claimed private rights are then considered public domain. Congress has recently affirmed the necessity to protect these private thoughts as private property rights by passing legislation, with overwhelming bipartisan support, nationalizing trade secret protection. Simultaneously trivializing the rights as public property rights after inducing the individual

to disclose these nationally protected valuable secrets (inventions), denies the proper constitutional protection for those private thoughts and rights and renders the quid pro quo of the Patent/Copyright clause agreement illusory.[5]

E. IPRs Violate the Three Principles of the U.S. Constitution Article I, Section 8, Clause 8

The Constitutional imperative of Article I, Section 8, Clause 8, as gleaned from its plain language and recognized by the Framers, provides three specific purposeful goals: (1) *Incentivizing innovation and creative aspirations*; (2) *Securing intellectual property rights to the individual (rather than the state or the public)*; (3) *Uniformity of protection for intellectual property rights. See* The Federalist No. 43 (James Madison).

The administrative agency IPR adjudication of patent validity is counter to the constitutional imperative and violates its three principles.

1. Incentivizing Innovation and Creative Aspirations

There is an ample body of evidence that the IPR's 80% invalidation rate dis-incentivizes innovation and creative aspirations. Confidence in the valuation of patented technology has all but disappeared. The expense of acquiring a patent that has a mere 20% chance of surviving a validity challenge post-issuance deters the necessary investment in R & D required for innovation.

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5. Stripping away an issued patent's presumption of validity has a similar effect.

Roulette wheels in Las Vegas Casinos offer better odds for a return on investment. IPRs violate the *incentivizing* principle of the Constitutional imperative.

2. Securing Intellectual Property Rights to the Individual Rather Than The State (the Public)

Inducing an inventor to disclose his/her private creative thoughts and ideas in exchange for securing those rights to the individual, in accordance with the Constitutional guarantee of securing the rights to the individual, requires the sovereign to honor and protect those rights as private (belonging to the individual) rather than confiscating them, post-issuance of the patent certificate, as public property. Anything less violates the *securing* principle of the Constitutional imperative.

3. Uniformity of Protection for Intellectual Property Rights

The bizarre reality of two different adjudicative standards for the same determination (*e.g.*, patent invalidity) by the administrative agency, in PTAB trials, and by Article III Courts, deciding patent disputes, is counter to the uniformity principle underlying the Constitutional imperative (*e.g.*, PTAB Broadest Reasonable Interpretation or BRI claim construction based upon preponderance of the evidence and absence of presumption of validity, compared with, Article III courts' Phillips' ordinary meaning claim construction based upon clear and convincing standard and presumption

of validity).[6] The inconsistency derived from a lack of uniformity, is compounded by the unpredictability of finality and binding authority in those patent validity determinations that occur with multiple parallel-tracked validity determinations in the two separate fora concerning validity of the same challenged patent claims.

Congressional exercise of its powers to legislate in this context has violated the principles behind the Constitutional imperative and exceeded its authority by usurping the authority of the third branch to set uniform standards for adjudicating patent validity disputes consistent with the Constitutional imperative.

The founders recognized the necessity for the independence of the third branch of government by providing for lifetime appointment and non-diminution of compensation for Judges. *See* U.S. Const. art. III, § 1. In Federalist No. 10, James Madison articulated the important recognition of the "faction" impact on a democracy and a republic. *See* The Federalist No. 10 (James Madison). In

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6. The "broadest reasonable interpretation" claim construction standard provides that the claim is given its broadest reasonable meaning consistent with the language of the claim as viewed within the context of the patent specification. It is the standard employed by patent examiners for original patent application examinations and in some *ex parte* proceedings at the USPTO, where, unlike adversarial IPRs, a patent applicant may *freely* amend its claims in response to such construction. The Article III courts' standard provides that the language of a claim, and a disputed claim term, acquires its ordinary meaning from the viewpoint of a person of ordinary skill in the art within the context of the patent specification at the time of the invention. *Phillips v. AWH. Corp.*, 415 F.3d. 1303, 1313 (Fed. Cir. 2005).

Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. *See* The Federalist No. 51 (James Madison). In Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in *Marbury v. Madison*, 5 U.S. 137 (1803). *See* The Federalist No. 78 (Alexander Hamilton).

Congressional enactment of the AIA followed many years of lobbying for its enactment. Those efforts promoted and pushed for the legislation which, in the case of IPRs, runs counter to the Constitutional imperative behind Congressional authority to enact laws *that promote the progress of innovations by providing strong, stable protection for intellectual property.* The evidence that IPRs have the opposite effect and weaken intellectual property protection is undeniable. Furthermore, the combination of IPR patent invalidation rates, recent legislation nationalizing trade secret protection, and curtailment of patent eligible subject matter, further depletes patent protection and dis-incentivizes promoting innovation and progress -- all contrary to the Constitutional imperative.

F. IPRs are not the Talismanic Solution in the Quest for Improved Patent Quality and Patent Law Reform

To be sure, patent quality is in the best interest of all stakeholders and the integrity of the United States patent system. It is commendable that Congress has attempted

to achieve this goal. Unfortunately, IPRs, while paved with good intentions, have put the patent system on a dangerous road to a chaotic demise.

Solutions for improving patent quality need to be accomplished at the front-end administrative process and not at the expense of the Constitutional imperative and the separation of powers on the back-end enforcement regime. Robust and comprehensive examination practices at the application stage achieves the goal consistent with Congressional authority and the Constitutional mandate.

For its part, this Court has rendered recent decisions in patent cases that reign in "bad actors" on the enforcement back-end. *See, e.g., Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016); *Highmark Inc. v. Allcare Mgmt. Sys., 134 S. Ct. 1744 (2014)*; *Octane Fitness v. ICON Health & Fitness*, 134 S.Ct. 1749 (2014). These cases equip the trial courts with the necessary tools to combat abusive patent enforcement tactics without stifling the incentive to innovate, entrepreneurial investment in new technologies, and the disclosure of the private thoughts of inventors and innovators.

Unfortunately, the patent enforcement system has gone off the rails with Congress' empowerment of an administrative agency to assume the heretofore judicial function of adjudicating private party disputes over patent validity simultaneously with the Article III Courts under vastly different and inconsistent procedures.

G. The Constitutional Imperative of the Patent System is Not Disputed

The issue of Constitutionally guaranteed patent protection for individual inventors is non-controversial from the right or left political perspective. It is about what is right and wrong with IPRs and its adverse impact on the U.S. patent system vis-a-vis the balance of power between the branches of our tripartite form of government.

As evidenced by many of this Court's unanimous opinions in patent cases, the fundamental constitutional rights emanating from Article I, section 8, Clause 8, provide a singular foundation of principles that cannot be denied. The strength of these protections for the individual has been the lynchpin of the superior technological progress and economic success enjoyed over the history of our Republic's patent system. One need only compare American progress with that of repressive regimes that do not honor and support strong protection for the private intellectual property rights of the individual to realize the genius of the Founding Fathers and Framers behind the Constitutional imperative.

The basis for the Constitutional provision has served the country well throughout our history and should provide the basis for determining whether an Act of Congress achieves or violates the Constitutional imperative. And when, as here, it is evident that an Act of Congress (*i.e.*, the AIA provision establishing the IPR administrative agency adjudication of patent validity disputes and cancellation) is contrary to the Constitutional imperative, the Supreme Court's historical precedent, and to the antecedent common law, then that provision of the

AIA must be struck down as an unconstitutional violation of the Separation of Powers and the Seventh Amendment right to jury trial.

This Court has recognized in many other cases involving the Bill of Rights and Separation of Powers that Congress and/or the Executive has over-stepped its authority. Here the Separation of Powers and Seventh Amendment are at the heart of the case.

If the judicial branch does not abide and protect its own Constitutional independence and authority, and the individual's protections under the Bill of Rights, no other branch can.

II. Evolution of Public Property Rights v. Private Property Rights

A. Article III Separation of Powers

In 1856, in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856), the Supreme Court declared that Congress has the power to delegate disputes over public rights to non-Article III courts. The Court specifically held that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them . . . but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.* at 281. This Article I public rights carve-out from Article III courts was first recognized by the Court in the context of disputes between the government and private parties. *Id.*

In 1921, in *Block v. Hirsh*, 256 U.S. 135 (1921), the Court extended the doctrine to disputes between private parties concerning public rights. The Court upheld the constitutionality of a District of Columbia statute authorizing an administrative agency to determine fair rents for holdover tenants as provided by the statute in a dispute between a private party landlord and private party tenants. *Id.*

In 1929, in *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), the Court held that an adversarial proceeding by a company against a competitor for unfair importation practices under federal law did not need to be heard in an Article III court. *Id.* at 460-61. In *Bakelite*, the Court addressed the question of the constitutionality of "legislative courts." *Id.* at 451-52. The case concerned Executive power to levy tariffs and create a Tariff Commission to conduct hearings pursuant to the Tariff Act of 1922. *Id.* at 446. Determinations by the Tariff Commission were appealable to the Court of Customs Appeals. The Court declared the Court of Customs Appeals was a legislative court, *i.e.*, an Article I court. Thus, regarding matters purely within the scope of the legislative or executive branches, they may reserve to themselves the power to create new forums to decide disputes or delegate the adjudicatory function to administrative agency tribunals. *Id.* at 451.

More recently, in 1985, the Court in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), upheld the binding arbitration scheme of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). *Id.* at 571. Under FIFRA, pesticide manufacturers seeking to register a pesticide were required to submit health, safety, and environmental data to the EPA. *Id.* at 571-72. The data

could be utilized by the EPA in approving registrations by other manufacturers, but compensation for its use was owed to the earlier registrant. The amount could be determined by agency arbitration instead of in an Article III court. The Court in Thomas held that this statutory scheme does not violate Article III, noting that "[m]any matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts." *Id.* at 583. It followed that "Congress, acting for a valid legislative purpose to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.* at 593-94.

The following year, 1986, the Court in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 at 854 (1986), used the same rationale in upholding the constitutionality of adversary proceedings in the Commodity Futures Trading Commission ("CFTC"), for customers of commodity brokers to seek reparations from their brokers for violation of the Commodity Exchange Act ("CEA") or agency regulations. *Id.*

The Court expanded the Article I and Article II administrative agency adjudication of disputes between private parties concerning arguably private property rights in reliance upon its asserted nexus between the private rights and the public regulatory scheme or moreover the governmental interest in the outcome and resolution of those disputes. One can question this rationale and whether it presents an "open-ended" basis for unfettered expansion of regulatory control by the two

political branches of the U.S. Government without the checks and balances of the co-equal non-political third branch. Certainly, a connection can be drawn between these cases and the massive expansion of Article I and Article II *regulatory agencies* and *regulatory power* over daily activities related to private property rights.

As for the open-endedness of this unfettered power, the concern is evident in the 2011 case *Stern v. Marshall*, 564 U.S. 462 (2011), where this Court issued its most expansive pronouncement on the standard for applying the public rights doctrine. *Id.* In *Stern*, the Court continued to apply the analysis of public rights doctrine to disputes between private parties in "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority. . . . [W]hat makes a right 'public' rather than private is that the right is integrally related to particular federal government action." *Id.* at 498.

The Court however held that, the dispute between the parties in *Stern* concerned a claim *sounding in tort* and *thus could not be adjudicated by an Article I bankruptcy court. See id.* at 494. Rather, under Article III, an Article I bankruptcy court could not enter judgment on a state law counterclaim sounding in tort, because state law counterclaims "[do] not flow from a federal statutory scheme, . . . [are] not completely dependent upon adjudication of a claim created by federal law," and do not involve "a situation in which Congress devised an expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative

agency specially assigned to that task." *Id.* at 493-94 (citations omitted).

Most notably, under the *Stern* analytical framework, Article I and Article II tribunal adjudications *are prohibited* if the federal claim had antecedents in the common law in 1789 and those agency tribunals acting as factfinder in private disputes must receive plenary review in an Article III court to be considered constitutionally sound. *See id.* at 484-85.

This "historical antecedents" test is determined by examining whether a claim existed at common law in 1789, and if so, its resolution implicates the "judicial power," and a non-Article III tribunal may not finally adjudicate it at the trial level. The Article III purpose, its system of checks and balances, and the integrity of judicial decision making would be denied if the other branches of the Federal Government could confer the Government's "judicial power" on entities outside Article III. That is why since *Murray's Lessee* it has long been recognized that Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." 59 U.S. 272 (1856).

When a suit is made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789" and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. *Stern*, 564 U.S. 462. The Constitution assigns that job – resolution of "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law,

issues of fact as well as issues of law" – to the Judiciary. *Id.* at 495.

Nevertheless the Court went on to recognize that Article III precedent "has not been entirely consistent." *Id.* at 497. As Justice Scalia's concurrence stated, this realization of how the *Stern* outcome was reconciled with every "not . . . entirely consistent" holding of the past has led reasonable jurists to believe that there were no less than seven distinct legal standards announced in the majority opinion. *Id.* at 507 (Scalia, J., concurring).

It is important to note that no public rights case involves the disclosure of private thoughts induced by the Sovereign, and, under the historical antecedent test non-Article III tribunals may not finally adjudicate patent disputes at the trial level. Also, as in *Stern*, under the common law, violations of patent rights have been treated as a tort since a patent dispute is fundamentally an action in tort. *Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, 283 U.S. 27, 33 (1931).

Furthermore, private property rights are all of those rights that are not categorized as public property rights. Thus, all other rights are considered "private" and may only be subject to adjudication in Article III Courts. This guarantee is a fundamental element of the Constitution that helps ensure the separation of powers of the three branches of government. *See Stern*, 564 U.S. 462, 484.

It is also noteworthy that this Court has recently held in *Matal v. Tam*, 137 S. Ct. 1744, 1760-61 (2017), in the context of Trademark rights, that like Copyrights, Trademarks are "private" speech. Additionally, as pointed

out by Justice Thomas (joined by Justice Scalia) in his dissenting opinion in *B&B Hardware, Inc. v. Hargis Indus.*, 135 S. Ct. 1293 (2015):

> "[T]he right to adopt and exclusively use a trademark appears to be a *private property right that "has been long recognized by the common law and the chancery courts of England and of this country."* *Trade-Mark Cases*, 100 U. S. 82, 92, 25 L. Ed. 550, 1879 Dec. Comm'r Pat. 619 (1879). As the Court explained when addressing Congress' first trademark statute, enacted in 1870, the exclusive right to use a trademark "was not created by the act of Congress, and does not now depend upon it for its enforcement." *Ibid.* "The whole system of trademark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage." *Ibid.* Thus, it appears that the trademark infringement suit at issue in this case might be of a type that must be decided by "Article III judges in Article III courts." *Stern*, 564 U. S., at 484, 131 S. Ct. 2594, 180 L. Ed. 2d 475, 495."

B&B Hardware, 135 S. Ct. 1293, 1317 (emphasis added).

The same is true for patent rights since the patent law developed from the common law.

B. Article III Separation of Powers in Invention and Land Patent Cases

In addition to issuing patents for inventions, the U.S. Government issued patents for land grants. *United States v. Stone*, 69 U.S. 525 at 535-38 (1864). Patents for invention and patents for land are treated the same way under the relevant law. *United States v. Am. Bell Tel. Co.*, 128 U.S. 315 at 358-59 (1888). The Supreme Court in several cases during the nineteenth century declared that a patent for either invention or land, once issued, is private property that has left the authority of the granting office.

The Court in *Am. Bell Tel. Co.*, compared Article I, Section 8, Clause 8, with Article IV Section 3, Clause 2 and stated that "the power . . . to issue a patent for an invention, and the authority to issue such an instrument for a grant of land, emanate from the same source, and although exercised by different bureau or officers under the government, are of the same nature, character and validity. . . ." *Id.* The Court held that to take away a patent after issuance invokes "private" rights – namely, fully vested property rights. *Id.* at 370. The Court found that the invention "has been taken from the people, from the public, and made the private property of the patentee . . . ." *Id.*

The Court has held, with respect to both patents for invention and patents for land, that it is an unconstitutional encroachment on Article III courts for the Executive to affect an issued patent in any way. *Id.* In *Am. Bell Tel. Co.*, the Court found that a patent is "the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set

aside or annulled by some judicial tribunal. . . ." *Id.* at 365. Any determinations as to whether a patent has been improvidently granted must be made by courts of law. The agency that issues the patent provides evidence of a grant by an officer who issues it acting magisterially and not judicially. *Id.* Such office or officer is not competent to cancel or annul the act of his predecessor. *Id.* That is a judicial act, and requires the judgment of a court. *Id.*

The Court, in *McCormick Harvesting Machine Co. v. Aultman*, 169 U.S. 606 at 609 (1898), held that a patent, upon issuance, is not supposed to be subject to revocation or cancellation by any executive agent. *Id.* The Court held that it is an invasion of the province of Article III courts for the Executive branch to revoke or cancel a patent as invalid. *Id.* at 612.

The Court reasoned that when a patent has received the signature of the Secretary of the Interior, countersigned by the Commissioner of Patents, and has had affixed to it the seal of the Patent Office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or cancelled by the President, or any other officer of the Government. *Id.* at 608-09. It has become the property of the patentee, and as such is entitled to the same legal protection as other property. *Id.* The Court noted that the only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent. And in this respect a patent for an invention stands in the same position and is subject to the same limitations as a patent for a grant of land.

There are numerous land patent cases preceding the invention patent cases that reached the same conclusion. In *United States v. Stone*, 69 U.S. 525 at 535 (1864), the Court determined that an Article I tribunal lacked the authority to void a patent for land. *Id.*

In *Moore v. Robbins*, 96 U.S. 530 (1878), the Court decided a dispute as to whether the Secretary of the Interior could rescind a patent for land where multiple parties claimed ownership over the same tract. *Id.* The Court reasoned that Article III courts are the sole venue for adjudication once a patent has been issued and become the private property of the patentee. The question of contested rights is within the jurisdiction of the land patent granting authority (the Land Office) but once the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the Land Office and the Executive. *Id.* at 532-33. Any disputes concerning the land patent must be decided by Article III courts. *Id.*

Similarly, in *Iron Silver Mining Co. v. Campbell*, 135 U.S. 286, 293 (1890), the Court, relying on the same rationale to prevent officers of the Land Department from requiring two competing land owners to appear regarding the patents' validity, stated that it "is always and ultimately a question of judicial cognizance." *Id.* The Court held that only the Article III Courts could hear the case. *Id.* at 301-02.

In both the invention and land patent cases the dispute arose as a result of a challenge to the validity of the granted patent. Whether the challenge is fueled by the issuing body's mistake or negligence, the same consequence obtains -- the issuing agency cannot

adjudicate the dispute. Once the grant has occurred the right is a private property right. Any dispute as to the patentee's private property must be heard by an Article III tribunal. Otherwise it violates the Article III Separation of Powers.

The harm to the rule of law that arises whenever persons other than Article III judges wield the judicial power is not overstated. The presumption of lifetime tenure and the prohibition against salary diminution is that it eliminates or minimizes the political influence on Article III judges. The lifetime tenure and no salary diminution requirement of Article III provide the greatest opportunity to maintain the independence of the Federal Judiciary. Also, the Article II advise and consent role for Senate confirmation of Presidential nominees to Article III courts guarantees the People a representative voice in the vetting process. These protections do not exist in administrative agencies of the Executive branch, whose employees perform their duties *within the bureaucracy subject to the power and authority of agency leaders, the President, and/or Congress.*

C. The Public Rights Exception Violates the Seventh Amendment Right to a Jury

The Seventh Amendment provides that, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." *See* U.S. Const. amend. VII.

The public rights exception for administrative agency tribunals runs afoul of the Seventh Amendment right to a trial by jury with respect to the PTAB IPRs challenging the validity of patents. As pointed out in the discussion of the Supreme Court's invention patents and land patents,

the dispute is one that should be viewed as a private property rights case and not a public property rights case. Moreover, historically in the United States, the issues of patent validity have been adjudicated in Article III courts.

Additionally, the Seventh Amendment right to a jury trial is violated under the Court's historical antecedent test. Under the English Common law of the eighteenth century (at the time of the framing of the United States constitution) the validity of patents sounded in common law. Such was the case whether incident to an infringement action or as a direct action to revoke in the Chancery Court of law and equity (since the factual determinations were actually tried in the common law courts because only they had the power to empanel juries). *See Ex Parte Wood & Brundage*, 22 U.S. 603, 614-615 (1824). Accordingly, any distinction between validity determinations and infringement actions regarding the jury right is misplaced.

Patent infringement actions inherently rely upon the validity of the patent at issue. This is true whether decided by adjudication of the affirmative defense, counterclaim, stipulation, or the presumption of validity. The issues of patent infringement and patent validity are inextricably linked. Congress recognized this aspect of patent enforcement in the AIA one-year time bar for IPR petitions when the patent at issue is the subject of a patent infringement lawsuit. *See* 35 U.S. C. § 315.

Similarly, since the right to a jury trial is waivable, any patent dispute conducted by an Article III judge without a jury differs significantly from the PTAB IPR in that the litigants engage in the process knowing that their voluntary conduct waives the jury right. Patent holders faced with the challenge in IPRs are not afforded the opportunity to waive the jury right. And, of course,

the Separation of Powers Constitutional deficiency is not present since the matter is still tried as an Article III adjudicated proceeding.

While the specific question of the right to a jury trial in the context of IPRs is an issue of first impression, guidance may be obtained from the rationale of the Court's decision in *Granfinanciera v. Nordberg*. 492 U.S. 33 (1989):

> "Although 'the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791,' the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty."

Id. at 41- 42 (citations omitted).

> "[Congress] lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury.... to hold otherwise would be to permit Congress to eviscerate the *Seventh Amendment's* guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears. The Constitution nowhere grants Congress such puissant authority. '[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity,' nor can Congress conjure away the *Seventh*

> *Amendment* by mandating that traditional legal claims be brought there or taken to an administrative tribunal."

Id. at 51-52 (citations omitted).

In *Grunfinanciera*, a common law claim arose in an Article I bankruptcy court. *Id.* The Court held that a bankruptcy trustee was constitutionally entitled to a jury trial in an action to recover a fraudulent conveyance, as such suits are matters of private rights. *Id.* at 55-56. The Court found that although the common law claim arose in an Article I (Bankruptcy) Court the Seventh Amendment right to a jury still applied. *Id.* at 63-64.

III. Resolution of the Critical Constitutional Issues Raised by IPRs is Necessary to Insure the Integrity and Strength of the United States Patent System

The passage of the AIA was a culmination of efforts spanning several years of Congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business entity titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (the administrative challenges to patent validity through the PTAB IPRs).

The 113th and 114th Congress also grappled with then newly proposed patent law reforms that, if enacted, would have presented additional tectonic shifts in the patent law. Major provisions of the proposals included: fee-shifting measures (requiring loser pays legal fees - counter to the American rule); strict detailed pleadings requirements,

promulgated without the traditional Rules Enabling Act procedure, that exceed those of the Twombly/Iqbal standard applied to all other civil matters in federal courts, and the different standards applicable to patent claim interpretation between the PTAB IPR proceedings and Article III court litigation concerning patent validity.[7]

The Executive and administrative branch have also been active in the patent law arena.[8] President Obama was a strong supporter of the AIA and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at "patent troll" issues, we must innovate rather than litigate. Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to almost 250 Administrative Law Judges in concert with the AIA IPRs' strict timetable requirements.

The Supreme Court, in addition to the Articles I and II co-equal branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the present term there has been a steady increase in the number of patent cases decided by the Court. For example, in the 2014-15 term, patent cases occupied almost ten percent of the Court's docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much

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7. *See* Rando, Robert J., *Mastering Patent Claim Construction: A Special Master's Perspective*, 30 Touro L. Rev. 591, 595-98 (2014). Available at: http://digitalcommons.tourolaw.edu/lawreview/vol30/iss3/6

8. *Id.* at 598.

larger than those we have become accustomed to over the more recent terms.[9]

The need for strong protection of intellectual property rights is greater now than it was at the dawn of the Republic.[10] Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article I, Section 8, Clause 8. James Madison provides clear insight for its significance in the Federalist No. 43 (the only reference to the clause). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for: uniformity of the protection of IP rights, securing those rights for the individual rather than the state; and, incentivizing innovation and creative aspirations.

Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the formulation of the new Republic: how to promote a unified nation while protecting individual liberty. The fear of tyranny and protection of the "natural law" of individual liberty is a driving theme for the Constitution and throughout the Federalist Papers.[11]

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9. *Id.* at 594-95.

10. For a more detailed overview of the need for strong protection of intellectual property rights, see Rando, Robert J., *America's Need For Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters*, The Federal Lawyer, June 2016, at 12. Available at: http://www.randolawfirm.com/uploads/3/4/2/1/3421962/ip_insight.pdf.

11. "Ultimately, Federalist No. 43 reveals a rich understanding of the nature of IP and its place in the U.S. Constitutional order. In subtle and succinct fashion, Federalist No. 43 identifies the ultimate source for copyright and patent in an individual's natural right to the fruits of his or her labor. Madison regarded copyright

In Federalist No. 10, James Madison articulated the important recognition of the "faction" impact on a democracy and a republic. In Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in *Marbury v. Madison*.

All of these related themes are relevant to Article I, Section 8, Clause 8, and at the center of intellectual property protections then and now. The Federalist No. 10 recognition that a faction may influence the law has been playing itself out in the halls of Congress in the time period leading up to the AIA and in connection with more recent patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business

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and patent as forms of property that government is established to protect. Additionally, as Federalist No. 43 and other numbers point out, securing an individual's IP rights, consistent with the rules of justice, also furthers the public good by incentivizing further investments and discoveries that promote the "progress of science and useful arts." Consistent with Federalist No. 43, considerations of public good or social utility may be said to supply a boundary principle for IP rights, but natural right supplies IP's grounding principle in Publius's exploration of the U.S. Constitution." May, Randolph J. & Cooper, Seth L., *The "Reason and Nature" of Intellectual Property: Copyright and Patent in The Federalist Papers*, Perspectives from the Free State Foundation Scholars, January 14, 2014, Vol. 9, No. 4, at 15. Available at http://www.freestatefoundation.org/images/The_Reason_and_Nature_of_Intellectual_Property_011014.pdf

model entities, and pharma factions have been the drivers, proponents and opponents of certain of these efforts.

To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology where the law needs to evolve or conform to new realities. However, changes not grounded in the founding principles of the Constitution and the Patent/Copyright Clause (*i.e.*, uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee.

Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual's rights and effectively confiscates them. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and the best in the quid pro quo of political gain to the governing body threatens to undermine the individual's intellectual property rights and hinder the greatest economic driver and source of prosperity in the country.

All of these vital intersecting factors are resonating with the critical issues to be decided regarding the constitutionality of PTAB IPRs. The public property rights/private property rights jurisprudence can be clarified, and vital issues related to the strength of invention patent protection in the United States can be secured, through resolving the fundamental question of the constitutionality of Article II versus Article III adjudication of invention patent validity.

CONCLUSION

For the foregoing reasons and authority, AAC respectfully requests that this Court find that IPRs, as promulgated by Congress, and as currently administered, are an unconstitutional usurpation of the Article III Separation of Powers and violate the Seventh Amendment Jury Right.

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